STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on June 24, 1999

COMMISSIONERS PRESENT:

Maureen O. Helmer, Chairman
Thomas J. Dunleavy
James D. Bennett
Leonard A. Weiss

CASE 98-C-0690 - Proceeding on Motion of the Commission to Examine Methods by Which Competitive Local Exchange Carriers Can Obtain and Combine Unbundled Network Elements.

CASE 95-C-0657 - Joint Complaint of AT&T Communications of New York, Inc., MCI Telecommunications Corporation, Worldcom, Inc. d/b/a LDDS Worldcom and the Empire Association of Long Distance Telephone Companies, Inc. Against New York Telephone Company, Inc. d/b/a Bell Atlantic-New York (BA-NY) Concerning Wholesale Provisioning of Local Exchange Service by New York Telephone Company, Inc d/b/a Bell Atlantic-New York (BA-NY) and Sections of New York Telephone Company, Inc d/b/a Bell Atlantic-New York's (BA-NY) Tariff No. 900.

CASE 94-C-0095 - Proceeding on Motion of the Commission to Examine Issues Related to the Continuing Provision of Universal Service and to Develop a Regulatory Framework for the Transition to Competition in the Local Exchange Market.

CASE 91-C-1174 - Proceeding on Motion of the Commission Regarding Comparably Efficient Interconnection Arrangements for Residential and Business Links.

ORDER DENYING REHEARING AND CLARIFYING PRIMARILY LOCAL TRAFFIC STANDARD

(Issued and Effective August 10, 1999)

BY THE COMMISSION:

INTRODUCTION

In its April 6, 1998 Pre-filing Statement, Bell Atlantic-New York (BA-NY) committed to offering an expanded

extended link (EEL)[1/] to competitive local exchange carriers (CLECs). EEL availability would give CLECs with network facilities enhanced ability to compete for local customers by permitting access to unbundled local loops in many BA-NY central offices without the need to collocate in each BA-NY central office. Switch-based CLECs, relieved of the need for extensive collocation, could enter local markets more easily, making it more likely that residential and small business customers would experience the benefits of competition. On July 23, 1998, BA-NY filed proposed amendments to its P.S.C. No. 916 Telephone tariff designed to implement some of its Pre-filing commitments, among them, the EEL offering.

On March 24, 1999, the Commission issued an order (March 24 Order) requiring connection of EELs containing loops at and above the DS1[2/] level to a CLEC switch handling local exchange traffic and transmission of primarily local traffic by such EELs. No use restrictions were imposed on EELs containing loops below the DS1 level. While BA-NY proposed an EEL connection charge, a monthly rate that would apply in addition to the sum of monthly element rates, the Order directed that an expedited hearing be held to review whether there was a cost-based justification for imposition of an EEL connection charge.

On April 20, 1999, MCI WorldCom, Inc. (MCI) filed a petition for rehearing. Choice One Communications, Inc. (Choice One) filed its petition for rehearing on April 22, 1999 and the Association for Local Telecommunications Services, e. spire Communications, Inc. and Intermedia Communications, Inc. (Joint Parties) filed a joint petition for rehearing on April 23, 1999.

1/ An EEL consists of local loop, local transport, and multiplexing (transmitting two or more signals over a single channel), where required.

2/ DS is an acronym for digital signal, as opposed to analog signal. The DS appellation denotes a hierarchy of digital signal speeds used to classify capacities of lines and trunks. The fundamental speed level, generally used by small business customers, is DS0, 64 kilobits per second.

PETITIONS FOR REHEARING

A. MCI's Petition

MCI contends that the March 24 Order regarding EEL restrictions warranted rehearing because it was premised on errors of law. MCI states that the EEL connection charge and use restrictions were inconsistent with the Supreme Court ruling in AT&T Corp., et al. v. Iowa Utilities Board et al., 119 S. Ct. 721 (1999) (Iowa). MCI argues that the Iowa decision reinstated Rule 315(b) [47 C.F.R. section 51.315(b)] requiring BA-NY, as an incumbent local exchange carrier, to provide existing combinations of unbundled network elements[1/] such as EELs to CLECs on a nondiscriminatory basis pursuant to section 251(c)(3) of the Telecommunications Act of 1996 (Act). MCI also takes issue with an EEL connection charge, contending that Iowa implicitly referred to connection charges when it stated that the purpose of section 251(c)(3)'s non-discrimination requirement was to prevent disconnection of previously connected elements.[2/]

B. Joint Parties' Petition For Rehearing

The Joint Parties contend that the March 24 Order regarding EEL restrictions requires rehearing because (1) the Order was based on errors of law; (2) there was no legal basis for placing service restrictions on EEL use; and (3) Iowa made clear that the EEL was not a voluntary offering subject to restriction. The Joint Parties also maintain that the Commission restrictions violate the following sections of the Act: section 251 which requires incumbent local exchange carriers like BA-NY to provide nondiscriminatory access to network elements on an unbundled basis; section 251(c)(3) which requires nondiscriminatory access

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1/ Section 153(2) of 47 U.S.C. defines network element as "facility or equipment used in the provision of a telecommunications service."

2/ In a separate determination, the EEL connection charge (more appropriately referred to as a testing charge) was found to be cost-based, and, therefore, justified.

at nondiscriminatory rates; and section 271 requiring BA-NY to offer nondiscriminatory access to local loop and local transport.

The Joint Parties maintain that Iowa affirmed Federal Communications Commission (FCC) Rule 315(b) which disallows disconnection of previously connected elements. In addition, the Joint Parties cite the FCC's Local Competition Order[1/] as prohibiting the imposition of local service requirements for CLEC interconnection:

> We also conclude that requiring new entrants to make available both local exchange service and exchange access as a prerequisite to obtaining interconnection to the Incumbent LEC's network under subjection (c)(2) would unduly restrict potential competitors.
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> Id. at para. 185.

The Joint Parties further contend that both the Act and FCC Rules make unbundled network elements available for any telecommunications service. Section 51.309(a) of 47 C.F.R. states that "an incumbent LEC shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in a manner that the requesting telecommunications carrier intends." Since the FCC Rules state that the only restriction placed by the Act on the definition of a network element is that it must be "used in the provision of a telecommunications service," (Local Competition Order), para. 261) the Joint Parties conclude that EEL restrictions violate the FCC Rules and the Act. The Joint Parties also contend that the

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1/ Implementation of the Local Competition Provisions in the Telecommunications Act of 1993, Memorandum Opinion and Order, 11 FCC Rcd 15499, (Local Competition Order).

EEL restrictions violated the FCC's 706 Order,[1/], which found Congressional intent regarding the Act to be technologically neutral and pro-competitive by foreclosing CLECs from providing data services and favoring circuit-switch providers over packet-switch providers. The Joint Parties cited the Dedicated Transport provision of BA-NY and AT&T's interconnection agreement as being the functional equivalent of the EEL offering and claimed CLEC discrimination in that the same terms and conditions afforded AT&T would not be afforded other CLECs.

Finally, the Joint Parties urge clarification of the primarily local standard.

C. Choice One's Petition

Choice One questioned the underlying premise of the use of restrictions to foster local competition and requested that the Commission clarify its requirement that CLECs purchasing DS1 EELs use them to provide primarily local exchange service since the uncertainty regarding what amount of traffic qualified as primarily local could be interpreted against competitors of BA-NY's Infospeed DS1 services.

BELL ATLANTIC-NEW YORK'S RESPONSE TO THE PETITIONS FOR REHEARING

BA-NY contends that Iowa vacated the network element unbundling requirements of the FCC's Local Competition Order. In the absence of new requirements regarding specific individual elements, BA-NY maintains it is not required to provide access to combinations of those individual elements.[2/] Moreover, BA-NY argues that even if local loop and transport were designated by

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[1/] Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, FCC 98-188, Memorandum Opinion and Order and Notice of Proposed Rulemaking (706 Order).

[2/] BA-NY, however, did agree to continue to provide unbundled access to the seven network elements in the FCC's Local Competition Order pursuant to State tariff.

the FCC on remand as specific individual elements required to be provided, it still would not be obligated by law to provide the EEL because the EEL is not a combination already serving a customer.

BA-NY contends that, while the United States Court of Appeals for the Eighth Circuit vacated both Rule 315(b), requiring access to existing element combinations, and Rule 315(c), requiring access to new combinations, Iowa reinstated Rule 315(b) only. Therefore, BA-NY maintains that its Pre-filing Statement commitment to offer EEL service could be restricted because it was voluntary. BA-NY concludes that the EEL restrictions in the March 24 Order did not violate the law.

BA-NY also maintains that allegations of discrimination against CLEC were without basis since CLECs are not denied access to network resources and do not lack the ability to assemble data services on their own. The Dedicated Transport in the BA-NY/AT&T interconnection agreement is not discriminatory since the provisions of such agreements vary carrier by carrier depending on the negotiated outcome. BA-NY also claims that fundamental network elements are made available to CLECs without discrimination and that CLECs are free to assemble those elements.

BA-NY states that the primarily local requirement is clear, but points out that the standard would have to be applied to both transport and loop since an EEL-multiplexing combination would have multiple loops with different types of traffic.

DISCUSSION

The EEL allows switch-based CLECs to serve customers without requiring collocation in every BA-NY central office. This elimination of the need for extensive collocation increases the likelihood that CLECs will enter local markets, compete for residential and small business customers, and that benefits from that competition will be conferred on customers in New York State. As we have previously stated, "[i]t is critical that the tariff fully support this objective [of] fostering the

development of competition in residential and small business markets." March 24 Order, p. 8.

In furtherance of this objective of fostering local exchange service competition to residential and small business customers and to avoid EEL use "as a low priced substitute for special access and private line services which are already competitive" (March 24 Order, p. 8), we required connection of EELs containing loops at and above the DS1 level to a CLEC switch handling local exchange traffic and transmission of primarily local traffic by such EELs. No use restrictions were imposed on EELs containing loops below the DS1 level.[1/]

A. EEL Use Restrictions

MCI and the Joint Parties objected to the March 24 Order on the basis that any restriction on EEL use violates the law. The FCC's Local Competition Order requiring BA-NY, as an incumbent local exchange carrier (ILEC), to provide combined network elements to requesting CLECs was challenged. In 1997, the Eighth Circuit Court of Appeals overturned several FCC Rules promulgated by the Local Competition Order, among them the Rule subsections requiring ILECs to (1) combine unbundled network elements for requesting CLECs [47 C.F.R. section 51.315(c)]; and (2) supply already combined network elements. 47 C.F.R. section 51.315(b).

Iowa reversed the Rule 315(b) determination of the Eighth Circuit which had overturned the FCC's requirement that ILECs supply already combined network elements. The Supreme Court found that the goal of Rule 315(b), "preventing ILECs from 'disconnect[ing] previously connected elements...to impose wasteful reconnection costs on new entrants'" was rational. Iowa at 737. However, even though the FCC Rule requiring ILECs to supply existing network element combinations was upheld, the

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[1/] DS0 loops serve residential and small business customers while loops at the DS1 level and above have a higher capacity and serve large business customers and special access traffic.

question of which individual network elements must be made available to CLECs and under what circumstances those elements must be made available remains open in light of the Supreme Court's vacatur of the FCC's prior determination listing those elements.

When BA-NY committed in its 1998 Pre-filing Statement to make EELs available to CLECs, it was not required to do so by either the Act or FCC Rules 315(b) and (c) since the Eighth Circuit decision had overturned those Rules. Pending completion of the FCC's determination of which individual network elements meet a more strictly applied necessary and impair standard, federal law does not mandate access to the EEL.

Guidance from the FCC regarding which elements meet the necessary and impair standard will allow us to definitively conclude whether an EEL, comprised of individual elements, falls within Rule 315(b). Should the FCC decide EEL components are network elements that must be made available to CLECs without restriction, we have already stated that the EEL tariff criteria would be re-examined. March 24 Order, p. 9. However, to avoid delay of CLEC access to EELs, thereby stalling local competition, BA-NY's Pre-filing Statement affords a sufficient basis for providing EELs, subject to restrictions, at this time.

Commission regulations require a party seeking a rehearing to show "an error of law or fact or that new circumstances warrant a different determination." Section 3.7(b) of 16 NYCRR. Although the parties have urged us to adopt their interpretations of law, there is currently no legal requirement mandating that BA-NY make EELs available to CLECs without restriction. For the reasons discussed above, we deny the Petitions for Rehearing.

B. Primarily Local Requirement

Choice One and the Joint Parties maintained that it was necessary to clarify the primarily local standard in the March 24 Order. While BA-NY maintained the standard was not arcane, it pointed out that the primarily local standard should apply to

both transport and loops given that an EEL arrangement may consist of multiple loops and different types of traffic.[1/] After considering the parties' requests, it appears that some clarification would be useful.

In order to qualify for the EEL rate, a rate more favorable than the special access rate, the March 24 Order requires that EELs at and above the DS1 or T-1 level must be used to transmit primarily local exchange traffic. The primarily local standard will consist of a channel count test at the transport and loop level. When some local traffic is carried on 50% or more of DS1 level and above loop channels that are connected to a transport facility, the transport will qualify for EEL rates as will the loops, to the extent loops serve customers whose local needs are being satisfied by the EEL circuit. If the primarily local standard for transport is not met, then the EEL rates would apply only to those loops meeting the standard; i.e. for loops of DS1 level and above, some local traffic must be carried on 50% of the channels on the loop circuit.

The channel count test is consistent with the goal of using the EEL as a means to bring competition to residential and small business customers in New York State while avoiding use of the EEL as a low cost alternative for already competitive services. It will also enhance the clarity of the applicability of the primarily local standard.

The results of applying the channel count test to the primarily local standard will be monitored and if not consistent with policy goals, will be revisited.

[1/] EELs utilize T-carrier (T=Trunk) service, a digitally multiplexed carrier system supporting digitized voice and data transmission. The basic component of T-carrier service is a 64 kilobyte/second channel. Trunk Level 1, T-1 (DS1), typically has 24 such channels, T-2 (DS2) has 96 such channels, and T-3 (DS3), 672 channels.

The Commission orders:

1. The petitions for rehearing are denied.

2. The primarily local standard shall be implemented as discussed in the body of this order.

3. These proceedings are continued.

By the Commission,

(SIGNED)

DEBRA RENNER
Acting Secretary